Supreme Court, U.S.
FILED
SEP 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-69

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, *et al.*,
Petitioners,

v.

WILLIAM CONWAY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

---

BRIEF IN OPPOSITION

JEFFREY L. AMESTOY
Attorney General

THOMAS R. VIALL
ROBERT C. SCHWARTZ
Assistant Attorneys General
State of Vermont
133 State Street
Montpelier, VT 05602

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

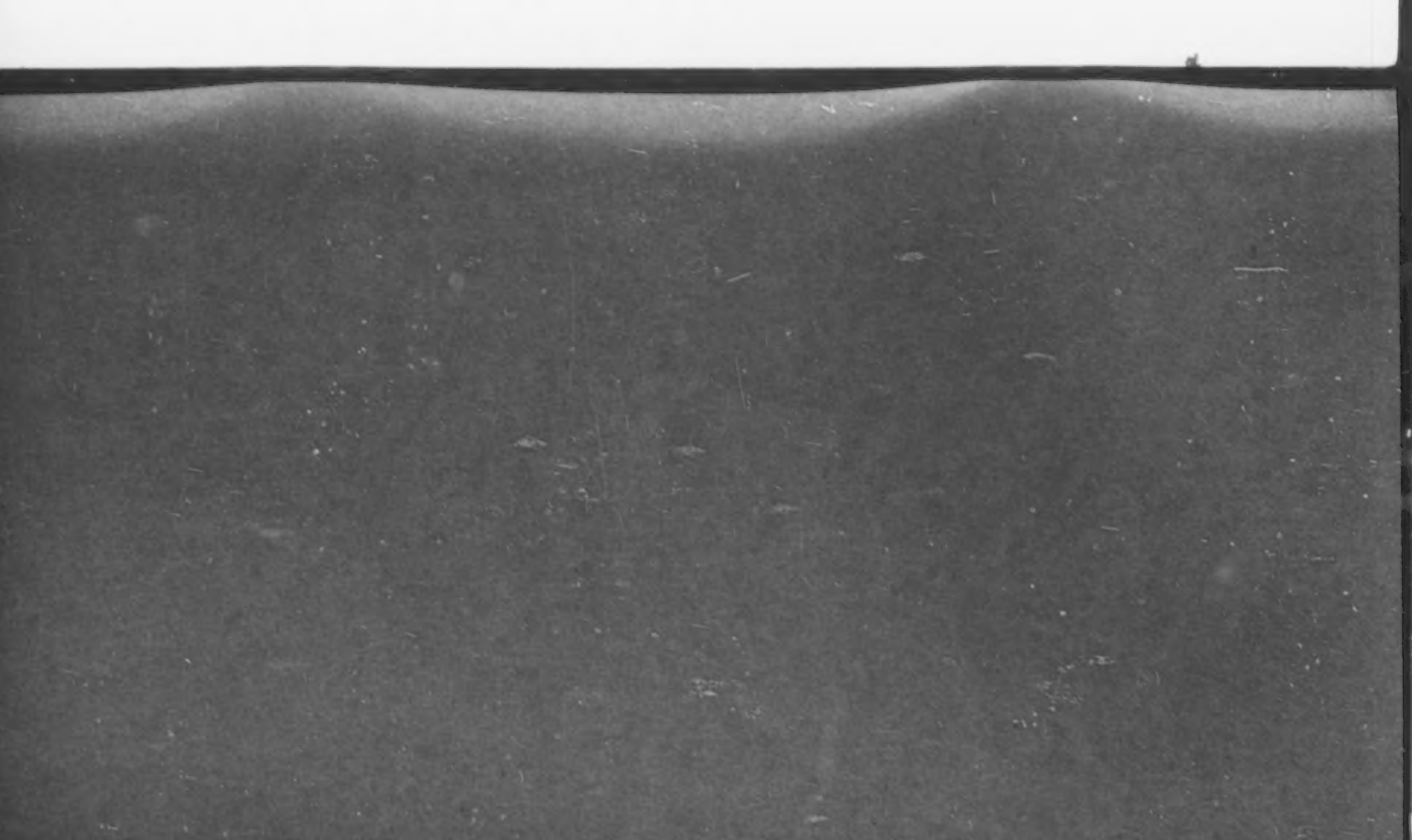

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. THE FEDERAL QUESTION SOUGHT TO BE PRESENTED HERE WAS NEVER RAISED IN THE VERMONT COURTS OR ADDRESSED BY THOSE COURTS, AND THIS COURT ACCORDINGLY CANNOT CONSIDER IT	2
A. Petitioners Never Raised the Issue Sought to Be Presented Here in the State Courts, and Those Courts Did Not Address It	2
B. Because the Issue Sought to Be Presented Here Was Neither Raised Nor Addressed in the Vermont Courts, This Court Cannot Consider It	9
II. EVEN IF THE QUESTION SOUGHT TO BE PRESENTED HERE HAD BEEN PROPERLY RAISED IN THE VERMONT COURTS, THAT QUESTION WOULD NOT WARRANT THIS COURT'S CONSIDERATION	18
CONCLUSION	24
APPENDIX—BRIEFS IN THE VERMONT STATE COURTS IN WHICH THE REFUND ISSUE WAS ADDRESSED	

TABLE OF AUTHORITIES

Cases	Page
American Trucking Associations, Inc. v. Conway, Dkt. No. S-95-86 WnC [Vt.] (Vt. Super. Ct. April 14, 1986)	23
American Trucking Associations, Inc. v. Conway, Dkt. No. S-147-86 WnC [Vt.], St. Tax Rep. (CCH) ¶ 200-263 (Vt. Super. Ct. May 21, 1986)	23
Atascadero State Hosp. v. Scanlon, —— U.S. ——, 105 S.Ct. 3142 (1985)	20
Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984)	18
Beck v. Washington, 369 U.S. 541 (1962)	15
Beers v. Arkansas, 61 U.S. 527 (1858)	19, 22
Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930)	15
Cardinale v. Louisiana, 394 U.S. 437 (1969)	10-11, 17
Carpenter v. Shaw, 134 Okla. 29, 272 Pac. 393 (1928), *rev'd*, 280 U.S. 363 (1930)	23
Carpenter v. Shaw, 280 U.S. 363 (1930)	23
Chisolm v. Georgia, 2 U.S. 419 (1973)	21
Consolidated Freightways Corp. of Del. v. Kassel, 730 F.2d 1139 (8th Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 126 (1984)	19
County of Lincoln v. Luning, 133 U.S. 529 (1890)	23
Cunningham v. Macon & B.R. Co., 109 U.S. 446 (1883)	19, 21-22
Eddings v. Oklahoma, 455 U.S. 104 (1982)	11
Edelman v. Jordan, 415 U.S. 651 (1974)	19, 20
Estate of Wilson v. Aiken Industries, 439 U.S. 877 (1978)	14
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)	19
Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945)	20, 22
Great Northern Insurance Co. v. Read, 322 U.S. 47 (1944)	22
Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932)	15
Hans v. State of Louisiana, 134 U.S. 1 (1890)	20-21

TABLE OF AUTHORITIES—Continued

Page

Heath v. Alabama, —— U.S. ——, 106 S.Ct. 433 (1985) 11
Herndon v. Georgia, 295 U.S. 441 (1935) 15
Illinois v. Gates, 462 U.S. 213 (1983) 11, 12, 17-18
In re Maher, 132 Vt. 560, 326 A.2d 142 (1974) 16
Iowa-Des Moines Nat. Bank v. Bennett, 284 U.S. 239 (1931) 22
J & J Anderson, Inc. v. Town of Erie, 767 F.2d 1469 (10th Cir. 1985) 19
Memphis & C.R. Co. v. Tennessee, 101 U.S. 337 (1980) 19
Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U.S. 313 (1930) 15
Monaco v. Mississippi, 292 U.S. 313 (1934) 22
Moor v. County of Alameda, 411 U.S. 693 (1973) 23
Nevada v. Hall, 440 U.S. 410 (1979) 19
Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) 20
Picard v. Connor, 404 U.S. 270 (1971) 12
Quern v. Jordan, 440 U.S. 332 (1979) 19, 20
Smith v. Reeves, 178 U.S. 436 (1900) 22
Spaulding et al. v. Mut. Life Ins. Co. of N.Y., 94 Vt. 42, 109 A. 22 (1920) 16
Terminiello v. Chicago, 337 U.S. 1 (1949) 11
Vachon v. New Hampshire, 414 U.S. 478 (1974) 11
Ward v. Love County, 253 U.S. 17 (1920) 22
Webb v. Webb, 451 U.S. 493 (1981) 10-11, 12-13
Wilson v. Cook, 327 U.S. 474 (1946) 15
Wood v. Georgia, 450 U.S. 261 (1981) 11

Constitution and Statutes

Constitution of the United States
Commerce Clause 3, 7, 9, 17, 22, 23
Eleventh Amendment 7, 20, 21

28 U.S.C. § 1257(3) 10, 16
42 U.S.C. § 1983 19
23 V.S.A. § 3020(b) 5, 13
23 V.S.A. § 3023 ..... 4, 5, 7

TABLE OF AUTHORITIES—Continued

Miscellaneous Page

Rule 21.1(h), Supreme Court Rules 9-10
Rule 40, Vermont Rules of Appellate Procedure.... 16
Stern, Gressman & Shapiro, *Supreme Court Practice* (6th Ed. 1986) 15-16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-69

AMERICAN TRUCKING ASSOCIATIONS, *et al.*,
Petitioners,

v.

WILLIAM CONWAY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

---

BRIEF IN OPPOSITION

ARGUMENT

Respondents urge that the petition for a writ of certiorari in this case be denied. As we show in part I of this brief, this Court is without jurisdiction to review this case, because the question sought to be presented here was neither raised nor decided in the state courts. As we show in part II, even were there jurisdiction, the question petitioners seek to have reviewed is not worthy of this Court's consideration, because the answer to that question is well-settled, adversely to petitioners' position, by numerous decisions of this Court.

I. THE FEDERAL QUESTION SOUGHT TO BE PRESENTED HERE WAS NEVER RAISED IN THE VERMONT COURTS OR ADDRESSED BY THOSE COURTS, AND THIS COURT ACCORDINGLY CANNOT CONSIDER IT.

In the Vermont courts, petitioners argued that they were entitled to a refund on the basis of state law. At no point did they suggest that the Federal Constitution entitled them to a refund. The Supreme Court of Vermont ruled that petitioners were *not* entitled to a refund as a matter of state law. It addressed no other question. Now petitioners seek to bring to this Court, as their sole question presented, a claim that the Federal Constitution entitled them to a refund. As petitioners never presented that claim to the Vermont courts, and those courts did not address that claim, this Court is without jurisdiction to entertain it.

We begin by setting forth the history of petitioners' quest in the Vermont courts for a refund, to establish that the issue tendered here was never presented to or addressed by those courts. We then show that in these circumstances this Court lacks jurisdiction to entertain the Petition.

A. Petitioners Never Raised the Issue Sought to Be Presented Here in the State Courts, and Those Courts Did Not Address It.

ATA I and *ATA II* were briefed to the Supreme Court of Vermont concurrently, and were decided by that Court in separate opinions on the same day. The parties briefed petitioners' claimed entitlement to a refund only in *ATA II*, and the Supreme Court of Vermont resolved that claim in *ATA II* and merely applied that ruling by reference in *ATA I*. Accordingly, we describe the proceedings in *ATA II* first. We have appended to this brief the pertinent portions of the briefs filed in the state courts, and cite thereto as "Br. Opp. App. ——."

ATA II

The complaint in *ATA II*, filed in the Superior Court of Washington County, Vermont, challenged, as violative of the Commerce Clause of the Federal Constitution, the $50 user fee enacted by the Vermont Legislature in 1982 (Act 172). The prayer for relief in the complaint sought, *inter alia:*

> (c) An order directing defendants to repay to plaintiffs and members of the plaintiff class any fees or penalties wrongfully, illegally or unconstitutionally collected from said plaintiffs by defendants pursuant to the statutes complained of herein.

The parties entered into numerous stipulations, including the following:

> 2. That in the event said Act Number 172 is finally declared to be unconstitutional and void in whole or in part, by Order of a Vermont Superior Court or any higher court having competent appeals jurisdiction thereof, any fees and penalties wrongfully or illegally obtained by the State of Vermont and its instrumentalities *and ordered to be repaid thereby* may be refunded pursuant to 23 V.S.A. 3020 as enacted by said Act Number 172, 23 V.S.A. 328 or in any other manner ordered by such Court. [Br. Opp. App. 32a-33a; emphasis added.]

On the basis of a stipulated record, the Superior Court entered a declaratory judgment that the $50 user fee violated the Commerce Clause (Pet. App. 60).

Petitioners promptly filed a Motion to Alter Judgment Order, requesting that the Order be amended to compel respondents to repay the fees and penalties that had been collected under Act 172 (Br. Opp. App. 29a). In an accompanying memorandum, petitioners argued that the State had agreed in the above-quoted stipulation to repay the fees if Act 172 were found unconstitutional (*id.* 30a-31a). Respondents opposed the motion. They argued,

inter alia, that the "stipulation does not agree that any fees or penalties *shall* be repaid, but merely sets forth a methodology by which they *could* be repaid, if so ordered by the Court" (*id.* 34a-35a; emphasis in original).

The Superior Court denied petitioners' motion (Pet. App. 31a-33a). The Court reasoned (*id.* 32a):

> [T]his is a case where an award of a monetary judgment is barred by the doctrine of sovereign immunity of the type found in *Stoneman v. Vergennes School Dist. #5*, 139 Vt. 50, 54-55 [421 A.2d 1307] (1980).

The Superior Court observed that "[a]rguably" 23 V.S.A. § 3023 would empower a court "to determine whether taxes should be refunded," but courts have only "appellate jurisdiction" under that provision to review decisions of the Commissioner of Motor Vehicles, and "there has been no decision on the Commissioner's part in this case" (*id.*).

Both sides appealed, respondents from the ruling that the user fee violated the Commerce Clause, and petitioners from the denial of a refund. Petitioners' statement of the "issue presented" respecting remedy was as follows:

> Did the Washington Superior Court err in refusing to order the Defendants to repay to Plaintiffs and members of the Plaintiff class all fees, fines or penalties collected by Defendants pursuant to the Diesel Fuel Tax Act (23 V.S.A. 415, 3007 and 3010 all as enacted or amended pursuant to Act No. 172)? [Br. Opp. App. 8a.]

Petitioners' opening brief in support of their appeal from the denial of a refund is set out in full text at Br. Opp. App. 9a-16a. As is apparent, petitioners made *no* contention that a refund was required as a matter of federal constitutional law. Their entire argument was predicated on state law grounds. They made the following points: under

Vermont law, monetary relief can be awarded in a declaratory judgment action (*id.* 9a-12a); that principle empowered the Superior Court to award such relief despite the inapplicability of 23 V.S.A. § 3023 (*id.* 13a); respondents agreed in the stipulation that if Act 172 were declared unconstitutional the taxes would be refunded (*id.* 12a); the trial court's ruling that monetary relief was barred by sovereign immunity was wrong because the court had read the Vermont Supreme Court's decision in *Stoneman* too broadly (*id.* 14a-15a); in any event sovereign immunity can be waived, and was waived here, by the Vermont legislature's inclusion of 23 V.S.A. § 3020(b) in Act 172 (*id.* 15a-16a).

Respondents' brief vigorously defended the Superior Court's ruling that the refund was barred by sovereign immunity (*id.* 21a-23a). To petitioners' argument that 23 V.S.A. § 3020(b) represented a waiver of sovereign immunity, respondents replied that petitioners, by instituting this action, had made an election of remedies and thereby "forfeited any right they may have had to get a refund under the . . . statutory scheme" (*id.* 21a). Respondents further argued that even if sovereign immunity were inapplicable, this was an equitable action and the question whether to award monetary relief was committed to the Superior Court's discretion (*id.* 18a-19a). That discretion was not abused here in denying monetary relief, because the fees collected were used for road maintenance, petitioners enjoyed the benefit of that road maintenance, and a refund order would substantially increase the state deficit (*id.* 20a).

In reply, petitioners disputed that under Vermont law abuse of discretion is the appropriate standard of review (*id.* 25a), disputed that under Vermont law the benefit they received from road maintenanee justified denying a refund (*id.* 26a-27a), suggested that an alternative means of refund was available under Vermont law that would mitigate the impact on the state deficit (*id.* 27a),

and disputed that they had made an election of remedies within the meaning of Vermont law (*id.* 27a-28a).

With the arguments thus poised, the Supreme Court of Vermont decided *ATA II*. After affirming the Superior Court's ruling that the user fee violated the Commerce Clause, the Court turned to the refund issue. The Court construed the stipulation as not conceding petitioners' entitlement to a refund (Pet. App. 10a):

> [T]he stipulation only recites possible repayment methods *should* the named courts order the refund. This stipulation has no effect until a court orders the refund of the taxes. [Emphasis in Court's opinion.]

The Court found that under well-settled Vermont decisional law it was without power to order a refund, because of the State's sovereign immunity (*id.* 10a):

> In Vermont, the State cannot be sued without its consent for injuries resulting from the exercise of functions essentially governmental in character . . . The imposition of a tax on fuel users for highway maintenance is an essential governmental activity, which could be performed only by a governmental entity.

The Court went on to explain that suits against state officers seeking a declaration as to the unconstitutionality of a state statute or an injunction against its enforcement "are not considered suits against the State for purposes of sovereign immunity" (*id.*).

> But an action to recover money which would be payable from state funds may be barred as a suit against the State . . .
>
> This distinction is grounded in the principle of sovereign immunity that the state legislature should determine the State's liability for money judgments. [*Id.* 10a-11a.]

The Court found analogous the line drawn by this Court for determining "when a suit is against a state for Eleventh Amendment purposes" (*id.* 11a).

Finally, the Court rejected the contention that the state legislature had waived the State's sovereign immunity by its enactment of 23 V.S.A. § 3023(b). The Court reasoned (*id.* 12a):

> This section has the clear purpose of redressing errors in the enforcement or implementation of the diesel fuel tax. It merely provides for a refund mechanism if errors are made in determining what tax is imposed. "Although it has been stated that 'the courts will adjudge monetary claims founded upon statute, because the Legislature has inferentially indicated an intent to provide the sums needed to make good the statutory scheme', in this case such an inference is negated by the fact that the Legislature denied funding." *Stoneman, supra*, 139 Vt. at 54, 421 A.2d at 1310 (citation omitted). Here, the Vermont legislature has not inferentially indicated its intent to provide the amounts paid to the state under a statute later declared invalid. The legislature may be presumed to rely on the receipt of tax revenues received from valid properly administered enactments. The power to levy taxes and appropriate the resulting funds is a fundamental attribute of sovereignty. That power would be sorely compromised if private citizens were able to do what the executive branch may not do—spend state funds without legislative appropriation. "Where no appropriation has been made, no action for a money judgment can be maintained." *Id.*

ATA I

The complaint in *ATA I*, also filed in the Superior Court of Washington County, challenged, as violative of the Commerce Clause of the Federal Constitution, the entry fees imposed by the 1981 Act (Act 87). Paragraph 7(c) of the complaint's Claim for Relief requested:

7. A temporary restraining order and preliminary and permanent injunction:

* * *

(c) Requiring Defendant Conway to refund to the payors the difference between the fee levels provided for in 23 V.S.A. 415, 415a and 417 prior to amendment and the amended fee levels as provided in [Act 87] . . .

A temporary restraining order was sought and denied, as described at page 4 of the Petition.

The Superior Court rejected petitioners' constitutional challenge to Act 87 and dismissed the complaint (Pet. App. 70a-79a). Petitioners appealed to the Supreme Court of Vermont. The brief on appeal addressed only the constitutionality of Act 87, and not any remedial issues. The "Conclusion" of petitioners' brief (Br. Opp. App. 38a) merely recited:

> The precise relief sought by Plaintiffs-Appellants is the reversal of the said Judgment Order, and the remand of the herein action to the Washington Superior Court for the purposes of granting to Appellants appropriate relief as requested in their complaint.

The Supreme Court of Vermont found the Superior Court's findings of fact inadequate to determine the constitutionality of Act 87, and remanded for further fact findings (Pet App. 24a-30a).

On remand, the trial court made additional findings of fact (Pet. App. 65a-69a), and on the basis thereof again upheld the constitutionality of the Act, dismissing the complaint with prejudice (*id.* 16a). Petitioners again appealed to the Supreme Court of Vermont, and briefing on that appeal took place concurrently with that in *ATA II*. While the petitioners' entitlement to a refund was briefed extensively in *ATA II*, as described above,

there was no separate briefing of that issue in *ATA I*. Petitioners' opening brief merely noted, in the Statement of Case, that the trial court in denying temporary injunctive relief had reasoned that "a methodology existed *by statute* for payment of refunds of fees paid in under the statutes attacked" (Br. Opp. App. 40a, emphasis added), and that "the monetary relief requested by the Plaintiffs is a refund to all Plaintiffs" of the fees collected (*id.* 40a). The only other reference to refund was in the Conclusion to petitioners' brief (*id.* 43a), which recited:

> The precise relief sought by the Plaintiff-Appellants is a declaration that the statutes in question are unconstitutional, the reversal of the above Judgment Order, and the remand of the herein action to the Washington Superior Court for the purposes of granting to Appellants appropriate monetary and other relief as requested in their Complaint.

The Supreme Court of Vermont reversed the Superior Court and concluded that Act 87 violated the Commerce Clause. With respect to petitioners' claim for monetary relief, the Court ruled:

> Plaintiffs' claim for monetary relief is controlled by our opinion in [*ATA II*], in which we held that sovereign immunity barred a similar claim. Accordingly, we deny this claim for monetary relief [Pet. App. 21a].

B. Because the Issue Sought to Be Presented Here Was Neither Raised Nor Addressed in the Vermont Courts, This Court Cannot Consider It.

The Petition virtually concedes what the foregoing recitation makes clear—that "petitioners did not . . . argue [in the state courts] that the Constitution requires a refund remedy for taxes collected in violation of the Commerce Clause" (Pet. 5, n.3). Most assuredly, the Petition does not contain a statement conforming to this Court's Rule 21.1(h):

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which *the federal questions sought to be reviewed* were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears . . . *as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.* [Emphasis added.]

In these circumstances, the controlling principle is as stated in *Webb v. Webb*, 451 U.S. 493, 495 (1981):

> Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257. As applied to the circumstances of this case, that statute requires that in the state courts petitioner have "specially set up or claimed under the Constitution . . . of . . . the United States" that right which she now seeks to have this Court enforce. 28 U.S.C. § 1257(3).

In *Webb*, the lone question presented to this Court had been argued in the state courts solely as a matter of Georgia law. 451 U.S. at 497-98. Accordingly, "the federal question was not raised below and . . . we are without jurisdiction in this case." *Id.* at 495.

> We cannot conclude on this record that petitioner raised the federal claim that she now presents to this Court at any point in the state-court proceedings. Thus, we confront in this case the same problem that arose in *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969): "Although certiorari was granted to consider this question, . . . the sole federal question argued here has never been raised, preserved, or passed upon in the state courts below." Citing a

> long history of cases, we stated there that "[t]he Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions."

Webb, 451 U.S. at 498-99.

Here, as in *Webb* and *Cardinale*, where the *sole* question presented is one that was not raised or decided below the defect is *jurisdictional*.[1] Petitioners, who did not ask the Vermont Supreme Court to consider whether the Federal Constitution entitled them to a refund, now ask this Court to find that that Court committed error because it did not *sua sponte* rule that there is a federal constitutional entitlement to a refund (Pet. 17-18). It is surely ironic that the Vermont Court—which adopted the constitutional arguments petitioners *did* advance *en toto*, indeed gave petitioners far more than was their due in those respects (as we explain in our conditional cross-petition)—should be condemned by petitioners for not enforcing a federal claim that petitioners did not present to it. It would be inconsistent with basic prin-

---

[1] The uncertainty expressed by this Court in *Illinois v. Gates*, 462 U.S. 213, 219-23 (1983), as to whether the Court's disinclination to reach an issue in *Gates* was jurisdictional or prudential, arose only because the petition in *Gates* presented another issue that *had* been raised below—thus vesting this Court with jurisdiction over the "judgment" below. 28 U.S.C. § 1257(3). It was in that posture that the Court in *Gates* reserved the question whether, as a jurisdictional matter, it had *power* to address other claims "not pressed or passed upon" in the state courts. That likewise was the posture in *Terminiello v. Chicago*, 337 U.S. 1 (1949) and *Vachon v. New Hampshire*, 414 U.S. 478 (1974), cited in *Gates*, 462 U.S. at 219; in *Wood v. Georgia*, 450 U.S. 261 (1981) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), cited in Justice White's concurring opinion in *Gates*, 462 U.S. at 247; and in *Heath v. Alabama*, —— U.S. ——, 106 S.Ct. 433, 436-37 (1985), where the Court again left unresolved the "jurisdictional or prudential?" issue.

Of course, in the instant case, even if the defect were not jurisdictional, prudential considerations would dictate that the issue not be considered, just as this Court concluded in *Gates* and *Heath*.

ciples of federalism were this Court to grant certiorari and sit in judgment of the Supreme Court of Vermont for failing to make a ruling it was never asked to make.

The statutory requirement that issues be presented to the state courts before they are brought here exists precisely to avoid that sort of friction between this Court and the state courts. As explained in *Webb*, 451 U.S. at 499-500:

> [A]lthough the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution . . . . Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law . . . . As the Court has elsewhere observed, this princip[le] of comity requires
>
> > 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.' *Younger v. Harris* 401 U.S. 37, 44 (1971).

It is, accordingly, "unseemly in our dual system of government for a federal . . . court to upset a state court [decision] without an opportunity to the state courts to correct a constitutional violation." *Webb*, 451 U.S. at 500, quoting *Picard* v. *Connor*, 404 U.S. 270, 275 (1971). See also, *Illinois v. Gates*, 462 U.S. 213, 219 (1983).[2]

---

[2] Beyond the principle of comity, there are also "very practical reasons for insisting that federal issues be presented first in the state-court system." *Webb*, 451 U.S. at 500. Requiring presentation of federal issues first in the state courts

> permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the

The Petition seeks to excuse the failure to present the issue to the state courts in two ways, neither of which bears analysis.

First, petitioners claim that "it appeared unnecessary" to raise in the state courts the question brought here, because neither respondents nor the lower courts "questioned . . . that a finding of unconstitutionality would lead to a refund . . . until the Supreme Court of Vermont rendered the decisions here challenged" (Pet. 5, n.3). But this is not a case where a constitutional issue was created for the first time by an unexpected ruling of the highest court in the State. Petitioners' constitutional claim to a refund did not arise by virtue of the ruling of the Supreme Court of Vermont: that claim could have been asserted at any time during the course of the litigation in the state courts. Petitioners were on notice in both the Superior Court and the Vermont Supreme Court that respondents were opposing their refund claim as unauthorized under Vermont law.[3] Yet petitioners

---

same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges . . . [*Id.* at 500.]

The court below was asked by petitioners to construe the state refund statute, 23 V.S.A. § 3020(b), without any notice that petitioners would later contend in *this* Court that the absence of a refund is a violation of the Federal Constitution.

[3] Petitioners are simply not correct in contending that their entitlement to a refund under state law was not "questioned . . . until the Supreme Court of Vermont rendered the decisions here challenged." When petitioners first moved for a refund order in the *Superior Court*, respondents *opposed* it (see pp. 3-4, *supra*). The Superior Court *denied* the motion for a refund order, ruling that petitioners' quest for a refund in this litigation was barred by sovereign immunity (Pet. App. 32a). And while that court, in dictum, observed that "[a]rguably" petitioners might be able to seek a refund through a different proceeding—an application to the Commissioner of Motor Vehicles, which could then be appealed to the Superior Court which in turn could then address "*whether* taxes should be refunded" (*id.* at 32a; emphasis added)—that dictum

In the instant case, petitioners elected not to file a petition for rehearing (styled "motion for reargument" in Vermont). Thus, even were they correct, as they are not, that the occasion for invoking their constitutional claim arose for the first time as a result of the decision of the Supreme Court of Vermont, petitioners failed to take the necessary steps thereafter to confer jurisdiction on this Court.[5]

---

rather generalized federal claim that had been presented to the state courts.

[5] Nor can petitioners take comfort in the wording of Rule 40, Vt. Rules of Appellate Procedure:

> The motion [for reargument] shall state with particularity the points of law or fact, *presented in the briefs upon the original argument*, which in the opinion of the moving party the court has overlooked or misapprehended and which would probably affect the result. [Emphasis added.]

The italicized language serves an obvious purpose for the generality of cases, but the Supreme Court of Vermont has made clear that it does not bar the presentation of a new claim "if a material mistake of law is made by the Court in deciding questions of law." *Spaulding et al. v. Mut. Life In. Co. of N.Y.*, 94 Vt. 42, 54, 109 A. 22, 28 (1920).

> The general rule undoubtedly has such a limitation . . . It should be, and we have no doubt is, the desire of courts to rectify any mistakes into which they may fall, when they may do so without contravening public policy and without working further injustice . . . No mere pride of opinion will be suffered to stand in the way of accomplishing this result. [*Ibid.*]

The Court also indicated in *Spaulding* that new claims can be made on reargument where the Court's opinion rests on a ground that could not have been anticipated. *Ibid.* See also, *In re Maher*, 132 Vt. 560, 562, 326 A.2d 142, 143-44 (1974) (despite rule against consideration on appeal of claims that were not made in the proceeding below, "questions of alleged constitutional import" will be considered on appeal although not raised below).

There is thus no doubt that the Supreme Court of Vermont would have entertained a motion for reargument raising the federal claim. But even if there *were* doubt, that would not excuse petitioners' failure to file such a motion. The purpose of 28 U.S.C. § 1257(3) is to afford state courts the *opportunity* to consider federal claims

Second, petitioners seek to excuse their failure to raise below the issue that they seek to present here by suggesting that that issue was subsumed in their attack on the constitutionality of the taxes: "As the lawsuits were originally filed, the claim of entitlement to a refund was made as an integral part of the constitutional attack on the validity of the taxes." (Pet. 5, n. 3.) See also, *id.* ("the sub-issue of remedy"). This effort, too, is without merit, for as petitioners concede, the issue they tender here is "a distinct federal question" from that presented to and decided by the Vermont courts (Pet. 5 n.3).

Petitioners' complaints in *ATA I* and *ATA II* were cast in the usual form: in the body they alleged that the state fee statutes were unconstitutional, and in the prayer for relief they requested a refund, without identifying the source of their alleged entitlement to a refund. No doubt these complaints were broad enough to have *enabled* petitioners thereafter to contend that the Federal Constitution was the source of their entitlement. But the fact is that they never made that contention. Instead, when it came time for petitioners to particularize their claim for relief, they urged exclusively that *Vermont law* entitled them to a refund as a remedy for the constitutional violation. The consequence is that the Vermont courts never understood that there was a federal remedy issue to address, and they did not address any such issue. They focused exclusively, as petitioners asked them to, on the state law grounds for refund invoked by petitioners.[6]

---

before they are brought to this Court, not to require those courts to *decide* them. See, *e.g.*, *Cardinale*, *supra*, 394 U.S. at 439.

[6] The analytical considerations that go into deciding whether a state fee statute violates the Commerce Clause are entirely distinct from those that go into deciding whether the Federal Constitution requires state courts to enter monetary awards against state funds in the face of the States' invocation of sovereign immunity from such awards (see pp. 18-23, *infra*). And as this Court explained in *Gates*, *supra*:

> "[D]ue regard for the appropriate relationship of this Court to state courts," *McGoldrick v. Compagnie Generale Transatlan-*

II. EVEN IF THE QUESTION SOUGHT TO BE PRESENTED HERE HAD BEEN PROPERLY RAISED IN THE VERMONT COURTS, THAT QUESTION WOULD NOT WARRANT THIS COURT'S CONSIDERATION.

The Supreme Court of Vermont has held that the State's sovereign immunity precludes the state courts of Vermont from entering monetary awards that would be paid from state funds to recompense those injured by state statutes ultimately held to contravene the Federal Constitution. Under Vermont's system of separated powers, only the state legislature can waive the State's sovereign immunity, and the court below concluded that the state legislature had not waived that immunity to allow the courts to enter a monetary award in this case.

Petitioners ask this Court to reverse that holding, contending that the Federal Constitution required the state courts of Vermont to enter a monetary award to be paid from state funds notwithstanding the State's assertion that its sovereign immunity foreclosed its courts from entering such an award. Petitioners' contention does not warrant this Court's attention, for it has been settled in this Court for more than a century that the Constitution did not take away the States' sovereignity in their own courts.[7]

---

tique, 309 U.S. [430], at 434-435 [1940)], demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials, *and, equally important, proposed changes in existing remedies for unconstitutional actions.* [462 U.S. at 221-22; emphasis added.]

Here, as in *Gates*, there never occurred in the state courts "the adversarial dispute necessary to apprise the state court of the arguments" sought to be presented here, and petitioners' remedy claim is "a separate claim that had to be specifically presented to the state courts," 462 U.S. at 223. See also, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276-77 (1984).

[7] In addition to seeking a change of this well-settled proposition, for petitioners to prevail they would have to establish a second

That proposition was first established in *Beers v. Arkansas*, 61 U.S. 527 (1858), holding that the Arkansas state courts were not obliged to entertain a monetary claim against the State for impairing the obligation of contracts in violation of the Federal Constitution:

> It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts . . . without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it . . . may withdraw its consent whenever it may suppose that justice to the public requires it. [*Id.* at 529.]

Accord: *Memphis & C.R. Co. v. Tennessee*, 101 U.S. 337, 339 (1880); *Cunningham v. Macon & B.R. Co.*, 109 U.S. 446, 451 (1883).

That this remains the Court's understanding today is evident from *Nevada v. Hall*, 440 U.S. 410 (1979), which described the States' immunity from suit in their own courts as follows:

> The immunity of a truly independent sovereign from suit *in its own courts* has been enjoyed as a matter of absolute right for centuries. Only the

---

proposition as well: that the Federal Constitution creates an implied cause of action for monetary relief against States in their own courts. *Compare, Edelman v. Jordan*, 415 U.S. 651, 672 (1974); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). For Congress has not created a statutory cause of action that would be applicable here. The complaint in *ATA II* invoked 42 U.S.C. § 1983. But it is doubtful that Commerce Clause claims are maintainable under § 1983, as that Clause does not secure individual rights of the type protected by § 1983. See, *e.g., Consolidated Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139, 1142-47 (8th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 126 (1984); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1476 (10th Cir. 1985). In any event, Congress did not in § 1983 create a cause of action for monetary relief against *state* funds. *Edelman v. Jordan, supra*, 415 U.S. at 672, 675-77; *Quern v. Jordan*, 440 U.S. 332, 340-41 (1979).

sovereign's own consent could qualify the absolute character of that immunity.

* * *

[N]o sovereign may be sued *in its own courts* without its consent. [440 U.S. at 414, 416; emphasis added].

Indeed, this premise lies at the heart of this Court's Eleventh Amendment jurisprudence. It is, of course, settled beyond peradventure that, by reason of that Amendment, a *federal* court may not, in a suit against state officers, require a State to refund taxes collected under a statute violative of the Commerce Clause. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945).[8] To conclude that the Federal Constitution requires *state* courts to order the refund of such taxes would mean that the Eleventh Amendment is simply a forum-selector, reflecting a preference that monetary awards against States be imposed in the state courts rather than the federal. But the controlling decisions of this Court have recognized that that is *not* the significance of the Eleventh Amendment. Rather, the framers recognized and accepted that the States could *not* be sued in their *own* courts without their consent, and the purpose of the Eleventh Amendment was to assure that the sovereignty thus retained in the *state* courts would not be vitiated by the entertaining of unconsented to suits against States in the *federal* courts.

In *Hans v. State of Louisiana*, 134 U.S. 1 (1890), which this Court has identified as the source of the current understanding of the meaning of the Eleventh Amendment,[9] the Court described the "anomalous result"

---

[8] *Ford Motor Co.* was quoted as authoritative in *Edelman v. Jordan, supra*, 415 U.S. at 663, in *Quern v. Jordan, supra*, 440 U.S. at 346 n.17, and in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984).

[9] See, *e.g., Pennhurst, supra*, 465 U.S. at 98 (1984); *Atascadero State Hosp. v. Scanlon*, —— U.S. ——, 105 S.Ct. 3142, 3145, 3148 n.3 (1985).

that would be produced were the Constitution construed to permit federal question suits against States in federal court, *id.* at 10:

> [W]e should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, . . . *although not allowing itself to be sued in its own courts.* [Emphasis added.]

The *Hans* Court recounted at length the historical support for the proposition that States are not suable in their own courts without their consent, as we detail in the margin.[10] That understanding was reiterated, on

---

[10] The *Hans* Court cited as authoritative Justice Iredell's understanding of the original intent of the Constitution's framers, expressed in his dissent to the decision that was overturned by the Eleventh Amendment, *Chisholm v. Georgia*, 2 U.S. 419 (1793). According to the decision in *Hans*, Justice Iredell correctly

> contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals (which he conclusively showed was never done before), but only . . . to invest the federal courts with jurisdiction to hear and determine controversies and cases . . . that were properly susceptible of litigation in courts. [134 U.S. at 12.]

The *Hans* Court also quoted from Hamilton, in Federalist No. 81, that

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. That is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . [T]here is no color to pretend that the state governments would, by the adoption of that plan, be devested of the privilege of paying their own debts in their own way, free from any constraint but that which flows from the obligations of good faith. [134 U.S. at 13.]

The *Hans* Court quoted Madison and Marshall to the same effect, 134 U.S. at 14, and expressly reaffirmed the declarations in *Cunning-*

the basis of the same historical materials, in *Smith v. Reeves*, 178 U.S. 436, 440-49 (1900), and *Monaco v. Mississippi*, 292 U.S. 313, 322-30 (1934).[11]

In the face of this uniform decisional law, petitioners invoke a number of decisions that are wholly inapposite. In none of the decisions petitioners cite was a State resisting a refund order on the ground that it enjoyed sovereign immunity from such an award in its courts, and in none had the state court refused a refund on the basis of sovereign immunity. In none of these cases, accordingly, did this Court address the question whether the Federal Constitution stripped States of sovereign immunity in their own courts in federal question suits. Indeed, in only three of the cases cited by petitioners did this Court hold that a refund was required, and two of those—*Ward v. Love County*, 253 U.S. 17 (1920) and *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239 (1931)—were suits to recover money from counties, which were never understood in this country to share the States' sovereign

---

ham v. Macon & B.R. Co., supra, and *Beers v. Arkansas, supra*, that states cannot be sued in their own courts without their consent, 134 U.S. at 16-17.

[11] See also, *Ford Motor Co., supra* 323 U.S. at 465, where the Court took as given that a State's waiver of immunity is required for a suit against the State based on the Commerce Clause to be maintained in state courts. In holding that an action in the federal courts for refund of taxes alleged to violate the Commerce Clause was barred by the Eleventh Amendent, the *Ford Motor Co.* Court noted that the State legislature had enacted a "tax refund statute as *a waiver of state immunity from suit in state courts*" (emphasis added). The Court added. "*'When* a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal courts to read *the consent* to embrace federal as well as state courts . . . [W] are dealing with *the sovereign exemption from judicial interference in the vital field of financial administration . . .'* "*Id.*, quoting *Great Northern Insurance Co. v. Read*, 322 U.S. 47, 54 (1944).

immunity.[12] In the third, *Carpenter v. Shaw*, 280 U.S. 363 (1930)—the lone case requiring a refund order against a State—not only was there no claim of sovereign immunity, but the state legislature had created a statutory cause of action in state court, authorizing its courts to order refunds of taxes collected by "the state," and the claim for a refund was brought in state court on the basis of that statute. See *Carpenter v. Shaw*, 134 Okla. 29, 272 Pac. 393, 395 (1928).

In sum, the question petitioners seek to present here has already been decided by this Court, adversely to petitioners' position, and that question accordingly does not warrant this Court's attention.[13]

---

[12] See, *e.g.*, *County of Lincoln v. Luning*, 133 U.S. 529 (1890); *Moor v. County of Alameda*, 411 U.S. 693, 717-18 (1973).

[13] Petitioners state that "without a refund requirement, the power of the Commerce Clause to deter the enactment of a series of discriminatory levies is greatly diminished, as the present case illustrates" (Pet. 13; see also, *id.* 13-14 nn.7, 8). But now that the Vermont Supreme Court has definitively settled that there is not a state law entitlement to refund, the lower Vermont courts have been issuing escrow orders in suits challenging subsequent tax statutes, reasoning that such preliminary relief is necessary because there is no adequate remedy at law. *American Trucking Associations, Inc. v. Conway*, Dkt. No. S-147-86 WnC [Vt], St. Tax. Rep. (CCH) ¶ 200-263 at 10,338-39 (Vt. Super. Ct. May 21, 1986); *American Trucking Associations, Inc. v. Conway*, Dkt. No. S-95-86 WnC [Vt.] (Vt. Super. Ct. Apr. 14, 1986); petition by State for review of these orders is pending in Supreme Court of Vermont.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JEFFREY L. AMESTOY
Attorney General

THOMAS R. VIALL
ROBERT C. SCHWARTZ
Assistant Attorneys General
State of Vermont
133 State Street
Montpelier, VT 05602

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340
Attorneys for Respondents

APPENDICES

APPENDICES

APPENDIX

BRIEFS IN THE VERMONT STATE COURTS IN WHICH THE REFUND ISSUE WAS ADDRESSED

Page

A. Appellant's Brief to Supreme Court of Vermont in *ATA II* 1a

B. Appellees' Brief and Appellees' Cross Appeal to Supreme Court of Vermont in *ATA II* 3a

C. Appellant's Reply Brief to Supreme Court of Vermont in *ATA II* 17a

D. Appellees' Reply Brief to Supreme Court of Vermont in *ATA II* 24a

E. Motion to Alter Judgment Order in *ATA II* (Filed in Washington Superior Court) 29a

F. Memorandum in Support of Motion to Alter Judgment in *ATA II* (with Stipulation attached) 30a

G. Objection to Motion to Alter Judgment Order in *ATA II* 34a

H. Appellants' Brief to Supreme Court of Vermont in *ATA I* (first appeal) 36a

I. Appellants' Brief to Supreme Court of Vermont in *ATA I* (second appeal) 39a

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF VERMONT

Supreme Court Docket Number 83-484

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Plaintiff-Appellee

v.

WILLIAM CONWAY, VERMONT COMMISSIONER OF MOTOR VEHICLES, *et al.*,
Defendant-Appellant

Appeal From The Washington Superior Court
Docket Number S185-82WnC

APPELLANT'S BRIEF

---

* * * *

CONCLUSION

For the foregoing reasons the challenged statutes meet the tests set forth in *Complete Auto Transit v. Brady*, supra, 430 U.S. 274, and their constitutionality should be upheld. Appellant seeks a reversal of the Washington Superior Court's Order of August 31, 1983, and entry of judgment on the merits in favor of the State.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF VERMONT

SUPREME COURT DOCKET NUMBER 83-484

[Caption Omitted in Printing]

APPELLEES' BRIEF AND
APPELLEES' CROSS APPEAL

Table of Contents

Page

Table of Contents .....

Table of Cases and Authorities .....

Statement of the Case ..... [6a]

Statement of Facts .....

Statement of Issues Presented ..... [8a]

Argument

I. The Trial Court was correct in its conclusion that the $50 fuel user fees imposed by 23 V.S.A. 415, 3007 and 3010 violate the Commerce Clause of the United States Constitution because:

1. They discriminate against interstate commerce both on their face and in their operation; and

2. They are not fairly related to the services provided by the state.

A. Introduction .....

TABLE OF CONTENTS—Continued

Page

B. The Trial Court was correct in its declaration that the fuel user license fees and single trip fees imposed by 23 V.S.A. 415, 3007 and 3010, when viewed either individually or in concert with 23 V.S.A. 367, facially and invidiously discriminate between interstate and intrastate motor carriers. .....

C. The Trial Court was correct in its determination that the fuel user license fees imposed by 23 V.S.A. 415, 3007 and 3010 are not fairly related to the services provided by the state to operators of foreign-based motor trucks, and that they therefore violate the Commerce Clause of the United States Constitution .....

II. The taxing provisions of 23 V.S.A. 415, 3007 and 3010 unlawfully and unconstitutionally discriminate against interstate motor carriers in violation of the Privileges and Immunities Clause of the United States Constitution, Article IV, Section 2, Clause 3, the Fifth and Fourteenth Amendments of the United States Constitution and Chapter 1, Article 9 of the Vermont Constitution. The taxing provisions are also in conflict with lawful, controlling, and preemptive federal statutes and regulations and are void pursuant to the Supremacy Clause of the United States Constitution, Article 6, Clause 2.

A. Introduction .....

B. Equal Protection and "Proportional Contribution" Clauses .....

C. Privileges and Immunities Clause .....

D. Supremacy Clause .....

TABLE OF CONTENTS—Continued

Page

III. The refusal of the Washington Superior Court to order the Defendant to repay to Plaintiffs and members of the Plaintiff class all fees, fines or penalties collected by Defendants pursuant to the Diesel Fuel Tax Act (23 V.S.A. 415, 3007 and 3010 all as enacted or amended pursuant to Act No. 172) was erroneous for the following reasons:

1. Monetary relief is an appropriate remedy in this action.

2. The Trial Court has jurisdiction to award monetary relief in this action.

3. The doctrine of sovereign immunity does not apply under the facts in this matter.

A. Introduction ..... [9a]

B. Monetary relief is an appropriate remedy in this action ..... [10a]

C. The Trial Court has jurisdiction to order monetary relief in this action ..... [13a]

D. The doctrine of sovereign immunity does not apply in this action. ..... [14a]

Conclusion ..... [16a]

STATEMENT OF THE CASE

On June 2, 1982, the Plaintiffs, American Trucking Associations, Inc., Chemical Leaman Tank Line Incorporated and Anderson Trucking Service, Inc. filed a "Complaint for Injunctive and Declaratory Relief" in the Washington Superior Court challenging the constitutionality of 23 V.S.A. 415, 3007 and 3010, all as enacted and amended pursuant to No. 172 of the Acts of the 1982 (1981 adjourned) session of the Vermont Legislature. By Stipulation of the parties dated October 7, 1982, (Printed Case, p. 3), it was agreed that the named Plaintiffs would represent a class defined as all interstate motor carriers whose base-plate truck registrations are issued by jurisdictions other than the State of Vermont, and who were then, or in the future might become, subject to the licensing requirements and fees set forth in the challenged statutes.

The Plaintiffs requested a declaration that the said statutes, 23 V.S.A. 415, 3007 and 3010, violates the provisions of the Commerce Clause of the United States Constitution, the Supremacy Clause of the United States Constitution, the Fifth and Fourteenth Amendments to the United States Constitution, the Privileges and Immunities Clause of the United States Constitution, and Chapter I, Article 9 of the Vermont State Constitution. The Plaintiffs further requested that the Defendants be permanently enjoined from demanding, receiving or accepting any fees paid to them by Plaintiffs pursuant to the said statutes, and from the enforcement or execution of the aforesaid statutes directed against motor trucks not registered in the State of Vermont, or their owners or operators. (Printed Case, p. 3). The Plaintiffs also requested that the Court direct the Defendants to refund to Plaintiffs and members of the Plaintiff class any fees, fines or penalties wrongfully, illegally or unconstitutionally collected from said Plaintiffs by Defendants pursuant to the statutes in question. The mechanism for such

refunds was stipulated to by the parties on October 7, 1982. (Printed Case, p. 3).

On August 31, 1983, the Washington Superior Court, the Honorable James L. Morse presiding, issued its opinion and order. The Court decreed that §§ 415, 3007 and 3010 of Title 23 violate the Commerce Clause of the United States Constitution. (Printed Case, p. 8). The Order contained no discussion of the several other constitutional issues raised by Plaintiffs although they were briefed by the parties. The Defendants appealed from the said Order by Notice of Appeal dated September 30, 1983. (Printed Case, p. 10).

The said Judgment Order made no reference to Plaintiffs' request for repayment of the fees, fines or penalties collected by Defendants pursuant to the said statute. Therefore, Plaintiffs filed a "Motion to Alter the Judgment Order" in the case, dated September 9, 1983. (Printed Case, p. 9). In their motion, Plaintiffs requested that the said fees, fines and penalties be refunded by Defendants in accordance with the aforesaid Stipulation of the parties dated October 7, 1982. (Printed Case, p. 3). The said motion was denied by the Court in its "Opinion and Order" dated December 7, 1983. (Printed Case, p. 12). The Plaintiffs appealed from that order by Notice of Appeal dated December 19, 1983. (Printed Case, p. 13).

This matter is therefore the subject of cross-appeals. The appeal filed by the Defendants relates to the declaration by the Washington Superior Court that the statutes in question are unconstitutional. The Plaintiffs' cross-appeal relates solely to the issue of whether, as a part of its Judgment Order in this case, the Washington Superior Court should have awarded to the Plaintiffs and the members of the Plaintiff class monetary relief in accordance with the requests set forth in their Complaint, and the October 7, 1982 stipulation of the parties.

* * * *

Statement of Issues Presented

I. Was the Court correct in its conclusion that the $50 fuel user fees imposed by 23 V.S.A. 415, 3007 and 3010 violate the Commerce Clause of the United States Constitution?

II. Do the taxing provisions of 23 V.S.A. 415, 3007 and 3010 unlawfully and unconstitutionally discriminate against interstate motor carriers in violation of the Privileges and Immunities Clause of the United States Constitution, Article IV, Section 2, Clause 3, the Fifth and Fourteenth Amendments of the United States Constitution, Article IV, Section 2, Clause 3, the Fifth and Fourteenth Amendments of the United States Constitution, and Chapter 1, Article 9 of the Vermont Constitution? Are these taxing provisions also in conflict with lawful, controlling, and preemptive federal statutes and regulations and therefore void pursuant to the Supremacy Clause of the United States Constitution, Article 6, Clause 2?

III. Did the Washington Superior Court err in refusing to order the Defendants to repay to Plaintiffs and members of the Plaintiff class all fees, fines or penalties collected by Defendants pursuant to the Diesel Fuel Tax Act (23 V.S.A. 415, 3007 and 3010 all as enacted or amended pursuant to Act No. 172)?

ARGUMENT

* * * *

III. *THE REFUSAL OF THE WASHINGTON SUPERIOR COURT TO ORDER THE DEFENDANT TO REPAY TO PLAINTIFFS AND MEMBERS OF THE PLAINTIFF CLASS ALL FEES, FINES OR PENALTIES COLLECTED BY DEFENDANTS PURSUANT TO THE DIESEL FUEL TAX ACT (23 V.S.A. 415, 3007 AND 3010 ALL AS ENACTED OR AMENDED PURSUANT TO ACT NO. 172) WAS ERRONEOUS FOR THE FOLLOWING REASONS:*

1. *MONETARY RELIEF IS AN APPROPRIATE REMEDY IN THIS ACTION*
2. *THE TRIAL COURT HAS JURISDICTION TO AWARD MONETARY RELIEF IN THIS ACTION*
3. *THE DOCTRINE OF SOVEREIGN IMMUNITY DOES NOT APPLY UNDER THE FACTS IN THIS MATTER*

A. Introduction—

The matter appealed herein was commenced pursuant to the Declaratory Judgments Act, 12 V.S.A. 4711 *et seq.* In their Complaint, Appellees requested that the Trial Court declares 23 V.S.A. 415, 3007 and 3010 unconstitutional. Appellees further requested that the Court direct the appellants to refund any fees, fines or penalties collected pursuant to the statutes in question.

By stipulation dated October 7, 1982, (Printed Case, p. 3) the parties to this action agreed as follows:

> That in the event the (Diesel Fuel Tax) Act is finally declared to be unconstitutional and void in whole or in part, by Order of a Vermont Superior Court or any higher court having competent appeals jurisdiction thereof, any fees and penalties wrongfully and

> illegally obtained by the State of Vermont and its instrumentalities and ordered to be repaid thereby may be refunded pursuant to 23 V.S.A. 3020 . . ., 23 V.S.A. 328 or in any other manner ordered by such Court.

While the Trial Court has declared the statutes unconstitutional (Opinion and Order of Washington Superior Court, dated August 31, 1983, Printed Case, p. 8) it has refused to order refunds of fees, fines or penalties collected under said statutes (Opinion and Order of Washington Superior Court, dated December 7, 1983, Printed Case, p. 12). The Trial Court's refusal to order refunds was based on three grounds. First, the declaration of unconstitutionality is a sufficient remedy and therefore monetary relief is not necessary or appropriate. Second, the Trial Court does not have jurisdiction to award monetary relief. Finally, "an award of a monetary judgment is barred by the doctrine of sovereign immunity."

Appellees contend that the Trial Court erred in denying the request to order refunds of all fees, fines or penalties collected pursuant to 23 V.S.A. 415, 3007 and 3010.

B. *Monetary Relief is an appropriate remedy in this action.*

The Trial Court cites *Neil v. Brockway*, 136 Vt. 119 (1978) in support of its conclusion that injunctive and monetary relief is not necessary in this case. However, that decision does not limit or remove the Superior Court's jurisdiction to issue monetary awards as part of its judgment in declaratory judgment actions. In relevant portions, it simply held that claims for monetary relief are not a required pleading in declaratory judgment actions. It does not stand for the proposition that a Superior Court is unable to entertain monetary claims as a part of its declaratory judgment jurisdiction.

Likewise, *Auclair v. Vermont Electric Power Co.*, 133 Vt. 22 (1974) does not limit the ability of the Superior Court to make monetary awards in the context of this action. That case construed the jurisdiction of the Superior Court *vis-a-vis* that of the Public Service Board. It is of no assistance in our determination of whether the Washington Superior Court can make monetary awards within the ambit of the Declaratory Judgments Act.

It is clear from the interpretation of the Uniform Declaratory Judgment Act made by the courts of other jurisdictions that monetary relief is an appropriate result in the context of declaratory judgment actions. In *New Haven Water Co. v. City of New Haven*, 4 A.2d 763, 131 Conn. 456, it was held that Plaintiff was entitled to interest as damages for detention of water charges in an action for declaratory judgment. Likewise, in another proceeding for a declaratory judgment, it was held that a landlord was entitled to a money judgment for rent due and unpaid even though not prayed for in the original petition. *McNally v. Moser*, 122 A.2d 555, 210 Md. 127, 60 A.L.R.2d 388 (1956).

The policy behind this rule is based upon the general consideration that once equity has attached the court should give full and complete relief in the interest of judicial economy. *Langevin v. Hillsborough County*, 320 A.2d 635 (N.H. 1974). This principle has been held applicable in declaratory judgment actions, *Phil J. Corp. v. Markle*, 241 A.2d 718 (Md. 1968), including such actions brought to test the constitutionality of a tax statute. *Berry v. Daigle*, 322 A.2d 320 (Maine, 1974). In *Berry*, the court stated that:

> A proceeding for declaratory judgment may be maintained even though an alternative remedy is available. The action is not contingent on the exclusivity of the remedy . . . Therefore, despite the fact that the regular procedure for recovery of taxes invalidly collected was by a common law action in

> assumpsit for money had and received . . . a declaratory judgment may be issued establishing the legality of the taxing authority and the rights of the parties with respect to the moneys collected. This position is in concert with the law of the majority of jurisdictions which have enacted the Uniform Declaratory Judgments Act and have considered its use in testing the constitutionality of a state law. *Id.* at p. 325; see 11 A.L.R.2d 359.

In *American Trucking Associations, Inc. v. Commonwealth of Kentucky*, Franklin Circuit Court, Ky. (82-CI-1033, January 6, 1983), the Court ruled that Plaintiffs were entitled to refunds of highway use fees after determining that the statute authorizing the fee was unconstitutional. Furthermore, the Court specifically ordered the Defendants to refund the fees "without the necessity of further hearings or orders of the court."

Similarly, in *American Trucking Association, Inc. v. Quinn*, 437 A.2d 623 (Maine, 1981), Plaintiff brought a declaratory action to test the constitutionality of a highway use tax statute. The Maine Supreme Judicial Court, in affirming the trial court's judgment that the statute was unconstitutional, ordered the Trial Court, on remand, to determine the disposition of fees collected under the unconstitutional statute and held in escrow. The propriety of monetary relief as an appropriate remedy in a declaratory action was assumed by the Court.

Finally, Appellees urge that the parties to this action, pursuant to their Stipulation which is set out in part A of this section, contemplated an order by the Trial Court requiring a refund of fees, fines or penalties in the event the questioned statutes were found to be unconstitutional.

Appellees respectfully request that the Supreme Court direct the Washington Superior Court to order a refund of all fees, fines or penalties which have been illegally collected by the state pursuant to 23 V.S.A. 415, 3007 and 3010.

C. *The Trial Court has jurisdiction to order monetary relief in this action.*

In its Opinion and Order dated December 7, 1983 (Printed Case, p. 12) the Trial Court, in refusing to order refunds, indicated that it lacked jurisdiction to "determine whether taxes should be refunded" in this action. The Court first recognized that it is empowered, under 23 V.S.A. 3023, to conduct, on the petition of an aggrieved taxpayer, a *de novo* review of any "decision, order or finding of the Commissioner of Motor Vehicles" made under the Diesel Fuel Tax Act. The Court then decided that, because the Commissioner has not yet issued a decision pertaining to refunds of fees collected under 23 V.S.A. 415, 3007 and 3010, it lacked jurisdiction to determine whether the fees should be refunded.

The Appellees respectfully submit that it is not necessary that the Court base its jurisdiction to order a refund in this action solely on the provisions of 23 V.S.A. 3023. There is another basis for jurisdiction, namely the power of the court in a declaratory judgment action to afford full and complete relief. The Vermont Supreme Court has often endorsed the doctrine that the "purpose of a declaratory judgment action is to enunciate, so far as is requested, the rights of the parties . . . and injunctive relief may be granted in such actions." *Groves v. Town of Waitsfield*, 130 Vt. 292 A.2d 247 (1972). There is little question that this doctrine completely empowers the Trial Court to order refunds in this action and it need look no further for a jurisdictional nexus with the refund issue.

It should also be noted that the Trial Court presently has before it all of the information required to determine the amount of fees, fines or penalties due as refund, as well as all parties claiming such refunds. Certainly it is more appropriate, in the interests of judicial economy, that the Trial Court proceed with its determination at this time.

D. *The doctrine of sovereign immunity does not apply in this action—*

In its Opinion and Order dated December 7, 1983, the Trial Court reaches certain conclusions of law on the subject of sovereign immunity which are contradictory. The Court first states that, based upon the doctrine of sovereign immunity, it is barred from making any monetary award in this matter. However, the Court then recognizes that, in the event of an appeal from a decision of the Commissioner of Motor Vehicles, under 23 V.S.A. 3020(b), denying repayment of fees illegally or wrongfully obtained, the Superior Court would have jurisdiction to conduct a *de novo* review of such decision pursuant to 23 V.S.A. 3023. Although the Trial Court recognizes the existence of 23 V.S.A. 3020(b) in a footnote to its Opinion, it fails to consider the full implication of that statute. If indeed the doctrine of sovereign immunity applies at all in this matter, a point which Appellees explicitly dispute, any protection thereunder which might otherwise be claimed by the state has been waived through the enactment of said Section 3020(b).

The Trial Court states that *Stoneman v. Vergennes School District #5,* 139 Vt. 50 (1980) discusses the type of sovereign immunity found in this case. However, the character of the statute forming the basis of the Supreme Court's decision in that case (16 V.S.A. 830(a)(c)), is quite unlike that found at 23 V.S.A. 3020(b). Section 3020(b) speaks in mandatory language, and is not based upon any requirement that the legislature appropriate sufficient funds to make repayment under it. On the other hand, the statute construed in *Stoneman* is not mandatory in its language, but rather bases tuition reimbursement to school districts upon the size of the legislative appropriation for that purpose.

The Trial Court also cites *Edelman v. Jordan,* 415 U.S. 651 (1974). It is of little relevance to the consid-

erations in this case. It deals with the more basic sovereign immunity rule under the Eleventh Amendment of the United State Constitution; i.e. a state must consent to suits in Federal Courts brought by its citizens or citizens from other states. *Edelman* also shares no factual similarity with the present case as it dealt with an analysis of Federal Regulations controlling the processing of welfare claims. These Regulations contained no mandatory reimbursement provision such as that found in 23 V.S.A. 3020(b).

As noted in *Stoneman*, the doctrine of sovereign immunity was "once venerated, resently vilified, and (is) presently substantially limited" in scope. *Supra*, p. 53. (Material in parenthesis added). Sovereign immunity is not as broad in scope as the Trial Court's Order implies.

The doctrine of sovereign immunity does not apply to declaratory judgment suits relating to constitutionality. See for example, *Grinnell v. State*, 435 A.2d 523, 121 N.H. 823 (1981), *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 690 (1949). In addition to that, it may be waived, either by express or reasonably implied consent of the legislature by statute. *State Employees Association of New Hampshire Inc. v. Belknapp County*, 438 A.2d 969 (N.H. 1982). The policy consideration behind expressed or implied waiver of sovereign immunity by the legislature of a state is, as so aptly noted in *O'Neill v. State Highway Department*, 50 N.J. 307, 235 A.2d 1, 5, N.1 (1967), based upon the principle that:

> The courts will adjudge monetary claims founded upon statute, because the Legislature has inferentially indicated an intent to provide the sums needed to make good the statutory scheme. See *City of East Orange v. Palmer, supra.*, 47 N.J. 329, 200 A.2d 679; *Amantia v. Cantwell*, 89 N.J. Super. 7, 12-13, 213 A.2d 251 (App. Div. 1965).

The waiver of sovereign immunity in this case is explicit. 23 V.S.A. 3020(b) provides:

> If the Commissioner determines that a tax, penalty, interest or fee required by this chapter has been paid more than once by a licensee, or has been *illegally or erroneously collected* or computed, the excess amount paid or collected shall be credited to the tax account of the licensee, and the licensee shall be notified thereof by mail. Any balance of the excess amount remaining in the licensee's account after crediting the overpayment shall be refunded if requested within 30 days of the date of mailing notice. (emphasis added)

The language of this statute is mandatory, not permissive. In light of our earlier discussion relating to the propriety of an award of monetary damages by the Superior Court in this case, Appellees would respectfully request that the Supreme Court reverse the Washington Superior Court's decision that sovereign immunity prohibits the refund of any taxes, penalties, or interest or fees wrongfully collected by the Commissioner pursuant to the provisions of 23 V.S.A. 415, 3007 and 3010, and that the Supreme Court direct that appropriate refunds take place.

CONCLUSION

For the reasons set forth above the Appellees respectfully request that the Honorable Court uphold the decision of the Washington Superior Court that the fuel user license fees imposed by 23 V.S.A. 415, 3007 and 3010 are unconstitutional and void, and further that the Honorable Court direct the Washington Superior Court to order repayment of all fees, fines or penalties collected by Defendants pursuant to said unconstitutional statutes in accordance with the request for relief set forth in Plaintiff's Complaint.

[Signatures omitted]

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF VERMONT

SUPREME COURT DOCKET NUMBER 83-484

[Citation Omitted in Printing]

APPELLANT'S REPLY BRIEF

TABLE OF CONTENTS

Page

Table of Authorities .....

Arguments—

I. THE DECISION OF THE TRIAL COURT SHOULD BE REVERSED AS THE TRIAL COURT, SITTING IN EQUITY, HAD NO JURISDICTION TO DECIDE THE CASE .....

II. THE $50 FEE IMPOSED BY 23 V.S.A. §§ 415, 3007, AND 3010 DO NOT VIOLATE THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION .....

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ORDER THE DEFENDANTS TO REFUND TO PLAINTIFFS ANY FEES, FINES, OR PENALTIES COLLECTED PURSUANT TO THE CHALLENGED ACT ..... [18a]

Conclusion ..... [23a]

* * * *

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ORDER THE DEFENDANTS TO REFUND TO PLAINTIFFS ANY FEES, FINES, OR PENALTIES COLLECTED PURSUANT TO THE CHALLENGED ACT.

If this Court sustains the trial court in finding the challenged statutory provisions to be unconstitutional, this Court should also sustain the trial court in its refusal to order the defendants to repay to the plaintiffs any fees collected under the Act.

In defining the scope of review of this part of the trial court's Order, it is submitted that the proper standard is whether the trial court abused its discretion. It is clear that this case is a case in equity, seeking declaratory and injunctive relief. In equity, the chancellor has broad powers to fashion relief in such a manner as he determines is appropriate. The general principle is stated at 30 C.J.S. Equity, Section 10:

> The sound discretion of the court is the controlling guide of judicial action in every phase of a suit in equity, including . . . the propriety of granting relief. . . . So the granting of equitable relief is ordinarily a matter of grace . . . and the propriety of affording equitable relief rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case.

See, Brown v. Douglas, 50 F.Supp. 877 (N.D. Texas 1943).

As similarly stated by the U.S. Supreme Court in *Hecht Company v. Bowles,* 321 US 321, 329 (1943):

> An appeal to the equity jurisdiction . . . is an appeal to the sound discretion which guides the determinations of courts of equity . . . . The essence of equity jurisdiction has been the power of the

> chancellor to do equity and to mold each decree to the necessities of the particular case . . . between the public interest and private needs. . . .

See also, Porter v. Warner, 328 US 395, 398 1949).

The New Hampshire Supreme Court has expressed similar sentiments in *Crocker v. College of Advanced Science*, 268 A.2d 844, 847 (Sup. Ct. NH 1970) where it stated:

> The propriety of affording equitable relief in a particular case rests in the sound discretion of the trial court to be exercised according to the circumstances and exigencies of the case. The consequences of granting relief should be balanced against the need for it.

As noted above, in exercising its discretion in fashioning relief in an equity case, the trial court should consider the consequences of granting the requested relief as balanced against withholding relief. *See also, DiGiovanni v. Camden Fire Association*, 296 US 64 (1935). Moreover, the effect of granting relief must be weighed against the public interest, *Great Lakes Dock Company v. Huffman*, 319 US 293, 297-8 (1943), and ". . . a court vested with equity jurisdiction may in its sound discretion refuse to assume jurisdiction of a matter when the interests of justice would be furthered." *Bateman v. South Carolina Port Authority*, 298 F.Supp. 999, 1004 (D.S.C. 1969).

This Court has expressed comparable sentiments in reviewing equity decisions of a trial court. In *Johnson v. Johnson*, 125 Vt. 470, 473 (1966) this Court stated:

> If the chancellor has granted or denied relief by the exercise of discretion based on such equitable considerations, the result is reviewable only upon a clear and affirmative showing of abuse.

See also, Sparrow v. Cimonetti, 115 Vt. 292, 304 (1948).

Applying these standards to the trial court's decision here, it is clear that the trial court did not abuse its discretion in granting appellees their requested declaratory judgment, but refusing to order a refund of all fees already paid. As noted earlier, all of the fees collected under the challenged statutory scheme went to the state highway fund, and were used for road maintenance, including snow plowing, salting, sanding, as well as repairs and maintenance. Without this money, these tasks could not have been performed, and obviously, the Appellees had the full advantage of all the road maintenance performed by virtue of these fees. If these fees were to be refunded, it would amount to almost $6,000,000 at this point in time. Obviously, the department does not have this money, and there is no excess money anywhere in the state budget to pay for this. This Court can take judicial notice of the actions of the recent legislative session in trying to eliminate an already existing state deficit of approximately $45,000,000.

Thus, since the Appellees had the full benefit of road maintenance through the expenditure of these funds, and since a refund would have a most serious impact on the public interest and the state deficit, it was not at all unreasonable for the trial court to deny Appellees this form of requested relief. The trial court properly determined that ". . . a declaratory judgment is sufficient without the need for injunctive relief."

A somewhat analogous situation was presented in *Brattleboro Retreat v. Town of Brattleboro*, 106 Vt. 228, 238-9 (1934), where this Court held that a taxpayer could not recover taxes paid under a statute, because the taxpayer ". . . could not accept the provisions [of the Act] beneficial to it without obligating itself to perform the conditions imposed." Here, Appellees accepted the benefits of road maintenance under the statute, and thus cannot now seek a refund of the very fees paid that made road maintenance possible.

The trial court recognized that 23 V.S.A. §§3020 and 3023 authorized the Washington Superior Court to conduct a *de novo* review *after* a decision by the Commissioner of Motor Vehicles on a refund question. However, the trial court properly noted that this action was not brought pursuant to 23 V.S.A. § 3023 and that section provided the only statutory authority for a refund.

Appellees made a choice in bringing this class action for declaratory and injunctive relief, rather than proceeding in individual cases to seek refunds pursuant to 23 V.S.A. §§ 3020 and 3023. There were many benefits to Appellees by pursing this matter in the manner they chose. They were able to get prompt and class-wide declaratory relief, which, if upheld, would eliminate the fees in the future. However, by choosing this route, they forfeited any right they may have had to get a refund under the established statutory scheme. If they had proceeded under 23 V.S.A. §§ 3020 and 3023, there is no express statutory authority for class relief, and thus, it is very possible that the broad relief granted here would not have been available to them. See, *Chittenden Trust Company v. MacPherson*, 139 Vt. 281, 285 (1981). The Appellees, having made their choice of procedure, must live with the consequences, both favorable and unfavorable, of the choice. They cannot have it both ways.

A separate, yet related, basis on which the trial court denied Appellees request for a refund, is that the refund is barred by the doctrine of sovereign immunity. Once again, this determination by the trial court was correct, and did not amount to an abuse of discretion by the trial court.

In *Stoneman v. Vergennes School District No. 5*, 139 Vt. 50, 53 (1980) this Court reaffirmred the basic principle that "An action against the state cannot be maintained without the state's consent for injuries resulting from the exercise of essentially governmental functions,

as opposed to proprietary functions." There can be no doubt that the collection of the challenged fees in this case was the exercise of a governmental function.

Since there is no statutory authority for the relief sought by Appellees, there is no consent by the state. In *Stoneman* this Court noted that the Legislature denied funding, to show lack of consent. Here too, there is absolutely no state funding available to pay this refund. In *Stoneman* this Court also noted that the state has consented to be liable for certain tort claims, 12 V.S.A. § 5601. However, an examination of the exceptions to the Tort Claims Act buttresses Appellants' argument here. There is a specific exception for "Any claim based upon an act or omission of an employee of the state exercising due care, in the execution of a statute or regulation, whether or not such a statute or regulation be valid . . .", 12 V.S.A. § 5602(1), as well as an exception for "Any claim arising in respect to the assessment or collection of any tax . . ." 12 V.S.A. § 5602(2). These two exceptions cover precisely the situation presented by this case and make it abundantly clear that the state has not waived its sovereign immunity relative thereto.

The federal courts have reached the same result as the trial court did by their application of the Eleventh Amendment to the U.S. Constitution, as clearly set forth in the leading case of *Edelman v. Jordan*, 415 US 651 (1974). As the trial court correctly noted, that case, against a state welfare department, held that it was appropriate to grant prospective declaratory relief invalidating a state law or regulation, but that the federal courts would not order a refund of welfare benefits wrongfully denied under the state rules.

The relevance of *Edelman* is most compelling in showing the balancing of interests to be weighed in cases of this nature, and the trial court here reached the same conclusion as did the U.S. Supreme Court in *Edelman*. It granted prospective relief, but denied a refund of past

due monies. The same public interest considerations are present in both cases, and thus the *Edelman* rationale does provide further support for the trial court's determination.

Thus, although the trial court had the authority to declare the statute to be unconstitutional, *Larson v. Domestic and Foreign Commerce Corporation*, 337 US 682 (1949), it is clear that the trial court correctly decided that the doctrine of sovereign immunity barred the refund of monies sought by appellees.

In sum, the trial court properly exercised its equitable discretion in molding the relief in this case to fit the circumstances of the case, and the public interest, and since there was no abuse of this discretion, the trial court's determination rejecting Appellees' request for a refund should be upheld.

CONCLUSION

For the foregoing reasons, Appellants respectfully submit that the trial court's decision holding the challenged statutes to be unconstitutional under the commerce clause must be reversed, and this Court should determine that the challenged statutes are constitutional.

If this Court determines that the trial court was correct in holding the challenged statutes to be unconstitutional, this Court should also affirm the trial court's ruling denying Appellees a refund of all fees, fines or other monies collected pursuant to said statutes.

[Signatures Omitted]

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF VERMONT

SUPREME COURT DOCKET NUMBER 83-484

[Caption Omitted in Printing]

APPELLEE'S REPLY BRIEF

TABLE OF CONTENTS

Page

Table of Contents .....

Table of Cases and Authorities .....

Statement of the Case ..... [25a]

Statement of Issues Presented ..... [25a]

Argument ..... [25a]

I. The opinions of the Trial Court should not be set aside on the ground that Assistant Judges signed those opinions .....

II. The refusal of the Trial Court to order the Defendant to repay to Plaintiffs and members of the Plaintiff class all fees, fines or penalties collected by Defendants pursuant to the Diesel Fuel Tax Act was erroneous ..... [25a]

Conclusion ..... [28a]

STATEMENT OF THE CASE

[The statement is verbatim the same as that in the opening brief, reprinted *supra* at pp. 6a-7a.]

* * * *

STATEMENT OF ISSUES PRESENTED

I. Should the opinions of the Trial court be set aside on the ground that Assistant Judges signed those opinions?

II. Was the refusal of the Trial Court to order the defendant to repay to Plaintiffs and members of the Plaintiff class all fees fines or penalties collected by Defendants pursuant to the Diesel Fuel Tax Act errroneous?

ARGUMENT

* * * *

II. *THE REFUSAL OF THE TRIAL COURT TO ORDER THE DEFENDANT TO REPAY TO PLAINTIFFS AND MEMBERS OF THE PLAINTIFF CLASS ALL FEES, FINES OR PENALTIES COLLECTED BY DEFENDANTS PURSUANT TO THE DIESEL FUEL TAX ACT WAS ERRONEOUS.*

The Appellees, in their Cross Appeal filed on March 12, 1984, argue that the Trial Court erred in refusing to award Appellees monetary relief in accordance with their prayer for relief and the October 7, 1982 stipulation of the parties.

The Appellants, in support of their claim that the Trial Court's refusal was proper, advance several propositions in their Reply Brief filed on April 25, 1984. Appellees believe that certain of these propositions are misapplied to the instant case.

The Appellants first suggest that this Court limit its review of the decision below to a determination of

whether the trial court "abused its discretion" in refusing to order the repayment of fees collected under the questioned legislation (Appellant's Reply Brief, Page 25). But a careful reading of the case cited in support of this proposition, *Johnson v. Johnson*, 125 Vt. 470 (1966) reveals that appellate review should begin wi a determination of whether the lower court based its grant or denial of equitable relief on equitable considerations relevant to and appropriate for the type of equitable proceeding involved. Only if the answer is affirmative is the Court's action "reviewable only upon a clear and affirmative showing of abuse." *Johnson*, supra at Page 423.

Appellees contend here, as they did in their cross appeal, that the Trial Court failed to identify any equitable considerations which override the fact that the parties herein have stipulated to a definite form of relief (Stipulation, October 7, 1982, Printed Case, Page 3). A declaratory judgment decree should render the relief prayed for where it will clarify the legal relations of the parties. *Commerce Insurance Company of New York v. Panpandrea*, 121 Vt. 386 (1960). This Court, therefore, should expand its review beyond the "abuse of discretion" standard.

Appellants next suggest that an award of refunds is barred because the Appellees have benefited from the expenditure of the challenged fees for highway maintenance and therefore are estopped from recovering the fees, citing *Brattleboro Retreat v. Town of Brattleboro*, 106 Vt. 228, 238-9 (1934). But in that case the Plaintiff, a charitable institution, voluntarily accepted the terms of its legislative charter of operation and challenged its constitutionality only after decades of operation thereunder. The Plaintiffs herein challenged the legality of the Diesel Fuel Tax Act immediately upon its enactment. Also Plaintiffs had no choice but to pay the fees. Failure to do so would subject them to sanctions, including fines,

jail terms and license suspensions under 23 V.S.A. 3009, 3022, 3024. The principle enunciated in *Brattleboro* is applicable only if a legislative enactment is voluntarily accepted.

Appellants next argue that the granting of refunds would have a serious adverse financial impact on the state treasury and therefore is "against the public interest." (Appellant's Reply Brief, Page 28). But Appellants should be estopped from now asserting this so-called equitable consideration as they long ago agreed to a refund of the questioned fees if the statute was declared unconstitutional (Stipulation, October 7, 1982, Printed Case, Page 3).

Appellants claim that the Vermont Agency of Transportation cannot afford to refund the fees collected under the challenged statutes. It must be pointed out that there is an existing statutory alternative to an outright refund. Under 23 V.S.A. 3020(b) the Commissioner of Motor Vehicles is permitted to "credit the account of a licensee for any fees or taxes "illegally or erroneously collected". Appellees, without conceding that refunds of fees assessed pursuant to an unconstitutional statute should ever be construed as against the public interest, suggest that the alternative remedy would alleviate the fiscal burden allegedly associated with direct refunds.

Appellants further argue that Appellees, by electing to bring this class action, have thereby forfeited their rights to individual refunds under 23 V.S.A. 3020(b). On the contrary, the parties to this action expressly stipulated that any fees illegally collected may "be refunded pursuant to 23 V.S.A. 3020 . . ., 23 V.S.A. 328 or in any other manner ordered by such court" (Printed Case, Page 3. Appellants, by stipulating that alternative remedies were in fact acceptable and appropriate, cannot now claim that Appellees have irrevocably elected a particular form of remedy. In any event, the case cited by Appel-

lants in support of their "election of remedies argument, *Chittenden Trust Co. v. MacPherson*, 139 Vt. 281 (1981), is inapplicable here. The question in that case was whether a litigant should be permitted to collaterally attack, by a class action, an unappealed from probate decree. The Court's ruling focused not on the "election of remedies" principle, but on the doctrine of *res adjudicata* and is therefore not relevant authority for the appellant's position.

Appelles submit that the doctrine of sovereign immunity does not apply in this action and that monetary relief is an appropriate remedy and incorporate by reference those supporting arguments advanced in Appellee's Cross Appeal.

Appellees respectfully request that the Supreme Court reverse the Washington Superior Court's decision and direct that any taxes penalties, interest or fees wrongfully collected by the Commissioner pursuant to the provisions of 23 V.S.A. 415, 3007, and 3010 be refunded.

CONCLUSION

For the reasons set forth herein the Appellees respectfully request that the Honorable Court uphold the decision of the Washington Superior Court that the fuel user license fees imposed by 23 V.S.A. 415, 3007 and 3010 are unconstitutional and void, and further that the Honorable Court direct the Washington Superior Court to order repayment of all fees, fines or penalties collected by Defendants pursuant to said unconstitutional statutes in accordance with the request for relief set forth in Plaintiff's Complaint.

[Signatures omitted]

APPENDIX E

STATE OF VERMONT

WASHINGTON COUNTY, SS

WASHINGTON SUPERIOR COURT

DOCKET No. S185-82Wnc

AMERICAN TRUCKING ASSOCIATIONS, INC. and CHEMICAL LEAMAN TANK LINE, INC. and ANDERSON TRUCKING SERVICE, INC., Individually and on behalf of all others similarly situated,

Plaintiffs

vs.

WILLIAM CONWAY, VERMONT COMMISSIONER OF MOTOR VEHICLES, PAUL PHILBROOK, VERMONT COMMISSIONER OF PUBLIC SAFETY, RICHARD SNELLING, GOVERNOR OF THE STATE OF VERMONT, and TOM EVSLIN, SECRETARY OF THE VERMONT AGENCY OF TRANSPORTATION,

Defendants

MOTION TO ALTER JUDGMENT ORDER

NOW COME the Plaintiffs, American Trucking Associations, Inc., Chemical Leaman Tank Line Incorporated and Anderson Trucking Service, Inc., by and through their attorneys, Conley and Foote, and move the Honorable Court pursuant to V.R.C.P. 59(e) to alter the Judgment Order in this case dated August 31, 1983 by ordering that the Defendants repay to the Plaintiffs and members of the Plaintiff class, any fees, fines or penalties, collected from said Plaintiffs by Defendants pursuant to 23 V.S.A. § 3007, 415, and 3010 or as a result of prosecution of Plaintiffs and the members of the Plaintiff class for violation of the said statutes, all in accordance with a certain Stipulation dated October 7, 1982, filed in this cause.

[Signatures omitted]

APPENDIX F

STATE OF VERMONT
WASHINGTON COUNTY, SS

WASHINGTON SUPERIOR COURT

Docket No. S185-82Wnc

[Caption Omitted in Printing]

MEMORANDUM IN SUPPORT OF MOTION TO ALTER JUDGMENT

Rule 59(e) of the Vermont Rules of Civil Procedure provides a basis for any party to request that the Court alter or amend its judgment on motion served not later than 10 days after entry of the Judgment Order. The reporter's notes in relation to the said Rule indicate that in the Federal Courts, motions of this type have been determined to be the appropriate method for modification of judgment orders or corrections thereto where in the Court's discretion such changes seem warranted in the interests of justice.

In this matter, the parties have agreed pursuant to a Stipulation dated October 7, 1982, a copy of which is attached hereto, that upon the declaration by Order of a Vermont Superior Court that all or any portion of number 172 of the Acts of the 1982 (1981 Adjourned) Session of the Vermont Legislature are unconstitutional, repayment of any fees and penalties wrongfully or illegally obtained by the State of Vermont and its instrumentalities would be refunded pursuant to 23 V.S.A. 3020, 23 V.S.A. 328 or in any other manner ordered by such

Court. The clear implication of the Court's Opinion and Order in this case dated August 31, 1983 is that such fees and penalties as were collected as a result of the enforcement of 23 V.S.A. 3007, 415 and 3010 will be refunded to the Plaintiffs and the relevant members of the Plaintiff class.

The purpose of this Motion is to clarify the methodology for such repayment and to avoid any dispute between the parties in that regard. It should be noted that in the Complaint in this matter dated June 2, 1982 the Plaintiffs requested the following relief:

> An Order directing Defendants to repay to Plaintiffs and members of the Plaintiff class any fees or penalties wrongfully, illegally or unconstitutionally collected from said Plaintiffs by Defendants pursuant to the statutes complained of herein.

For the reasons hereinabove set forth, the Plaintiffs respectfully request that their Motion to Alter the Judgment Order in this matter be granted.

[Signatures omitted]

STATE OF VERMONT

WASHINGTON COUNTY, ss

WASHINGTON SUPERIOR COURT

Docket No. S185-82Wnc

[Caption Omitted in Priting]

STIPULATION

NOW COME the parties in the above entitled action, by and through their respective attorneys, and stipulate and agree as follows:

1. The class to be represented by the named Plaintiff in the herein action is the class of all interstate motor carriers whose base truck registrations are issued by jurisdictions other than the State of Vermont (that is the persons owning or operating motor trucks upon the highways of the State not registered or required to be registered in this State, in the language of 23 V.S.A. 3007(b)), and who are now or may in the future become subject to the requirements and liable for payment of the fees set forth in 23 V.S.A. 415, 3007, and 3010 and section 15(c), all as enacted and amended pursuant to Number 172 of the Acts of the 1982 (1981 adjourned) session of the Vermont Legislature.

2. That in the event said Act Number 172 is finally declared to be unconstitutional and void in whole or in part, by Order of a Vermont Superior Court or any higher court having competent appeals jurisdiction

thereof, any fees and penalties wrongfully or illegally obtained by the State of Vermont and its instrumentalities and ordered to be repaid thereby may be refunded pursuant to 23 V.S.A. 3020 as enacted by said Act Number 172, 23 V.S.A. 328 or in any other manner ordered by such Court.

[Signatures omitted]

APPENDIX G

STATE OF VERMONT

WASHINGTON COUNTY, SS.

WASHINGTON SUPERIOR COURT

Docket No. S185-82WnC

[Caption Omitted in Printing]

OBJECTION TO MOTION TO ALTER JUDGMENT ORDER

NOW COME the Defendants by and through their attorneys Robert C. Schwartz and Thomas R. Viall, Assistant Attorneys General and object to the Plaintiffs' Motion to Alter the Judgment Order in this case. The basis for the objections are as follows:

1. If payment to the Plaintiffs' class is made, it will create an even greater inequity than it is attempting to rectify in that it will leave Vermont registered trucks, 18,000 pounds and over, still in position of having paid the fuel tax while out-of-state trucks have not; and, therefore, creates a discriminatory situation since Vermont registered trucks are not members of the Plaintiffs' class.

2. A stipulation does not agree that any fees or penalties *shall* be repaid, but merely sets forth a methodology by which they *could* be repaid, if so ordered by the Court, and if funds were available.

3. The ruling that the fuel license fee is unconstitutional with regard to the Plaintiffs' class, does not per se carry with it an automatic refund of fees and penalties collected. It is necessary to decide the issues of whether the Plaintiffs' class had derived a benefit from this fee and whether a breaking of a law, whether constitutional or not, should be condoned without paying a penalty.

For all the foregoing reasons, the Defendants respectfully object to the Plaintiffs' Motion to Alter and pray that the Court will deny the Motion or in the alternative, conduct a hearing to determine what, if any, limitations should be put thereon.

[Signatures omitted]

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF VERMONT

AMERICAN TRUCKING ASSOCIATIONS, INC.; and INTERNATIONAL TRANSPORT, INC., and G.H. HARNUM, INC., Individually and on behalf of all others similarly situated

vs.

WILLIAM CONWAY, VERMONT COMMISSIONER OF MOTOR VEHICLES, PAUL PHILBROOK, VERMONT COMMISSIONER OF PUBLIC SAFETY, RICHARD SNELLING, GOVERNOR OF THE STATE OF VERMONT and TOM EVSLIN, SECRETARY OF THE VERMONT AGENCY OF TRANSPORTATION, Each Individually and in their official capacities

---

Supreme Court Docket no. 82-021

Appeal from the

WASHINGTON SUPERIOR COURT

Docket no. S-217-81 Wnc

BRIEF [FOR APPELLANTS]

STATEMENT OF THE CASE

This is an action for declaratory judgment seeking declaratory, injunctive and monetary relief, (Complaint, Motion to Amend Complaint, Printed Case pp.1, 59) which was brought pursuant to 12 V.S.A. 4711 et seq. by American Trucking Associations, Inc., International Transport, Inc., and G. H. Harnum, Inc., individually and on behalf of a class defined by Order of the Washington Superior Court dated July 22, 1981. The Plaintiff class was defined as including "all interstate motor carriers primarily registered outside of the State of Vermont and now or during pendency of this action subject to payment of fees prescribed by 23 V.S.A. 415, 415a and 417." (Printed Case, p. 87). The Plaintiffs' application for temporary injunctive relief was denied by Order of the Washington Superior Court dated June 4, 1981.

The Washington Superior Court held a hearing on Plaintiffs' Motion for Preliminary Injunction and on the merits on August 6 and 7, 1981. The parties also submitted a Stipulation of Fact to the Court on August 6, 1981. (Printed Case, p. 103). It was agreed by the parties at the hearing on the merits that all evidence introduced at the hearings on Plaintiffs' Motion for a Temporary Restraining Order (June 3, 1981), Plaintiffs' Motion for Class Certification (July 22, 1981), and the hearing on the merits (August 6 and 7, 1981) should be considered by the Court in rendering its opinion on the merits. (Transcript, August 6, 1981; p. 51-2). After preparation of the transcripts of all hearings, and the filing of Memoranda of Law by the parties, Judge Edwin H. Amidon, Jr., in the Court's "Findings of Fact, Conclusions of Law and Judgment Order" dated January 1, 1982, as amended by an "Amendment to Findings of Fact, Conclusions of Law and Judgment Order" dated 7 January 1982, held that the statutes which were challenged in this action did not violate either the United

States' or the Vermont Constitutions, and dismissed the Plaintiffs' action with prejudice. It was further ordered that Defendant recover of Plaintiffs their costs of action. It is from this order, as amended, that the Plaintiffs appeal.

* * *

CONCLUSION

In its Judgment Order dated January 1, 1982, the Washington Superior Court upheld the constitutional validity of the statutes in question and so refused to grant Plaintiffs the relief requested in their complaint, stating as follows:

> It is hereby ordered and adjudged that Plaintiffs' action is dismissed with prejudice and that Defendants recover of Plaintiffs their costs of action. (Printed Case, pp. 253-4).

The precise relief sought by Plaintiffs-Appellants is the reversal of the said Judgment Order, and the remand of the herein action to the Washington Superior Court for the purposes of granting to Appellants appropriate relief as requested in their Complaint.

[Signatures omitted]

APPENDIX I

IN THE SUPREME COURT OF THE
STATE OF VERMONT

AMERICAN TRUCKING ASSOCIATIONS, INC., and INTERNATIONAL TRANSPORT, INC., and G. H. HARNUM, INC., individually and on behalf of all others similarly situated

vs.

WILLIAM CONWAY, VERMONT COMMISSIONER OF MOTOR VEHICLES, PAUL PHILBROOK, VERMONT COMMISSIONER OF PUBLIC SAFETY, RICHARD SNELLING, GOVERNOR OF THE STATE OF VERMONT and TOM EVSLIN, SECRETARY OF THE VERMONT AGENCY OF TRANSPORTATION, Each Individually and in their official Capacities

---

Supreme Court Docket No. 83-452

APPEAL FROM THE
WASHINGTON SUPERIOR COURT
DOCKET NO. S-217-81 Wnc

BRIEF [FOR APPELLANTS]

STATEMENT OF THE CASE

This is an action which is being appealed to the Vermont Supreme Court for the second time. It challenges the constitutionality of certain statutory provisions adopted in the Act of May 13, 1981, No. 87, secs. 18-19a, 1981 Vt. Acts 329, 340-342 (codified at 23 V.S.A. §§ 415-419 (Cum. Supp. 1982)), (hereinafter referred to as Act No. 87). Plaintiffs are seeking declaratory, injunctive and monetary relief on behalf of themselves and a class defined by the Washington Superior Court by order dated July 22, 1981. (First Printed Case, p. 87)[1]. The members of the Plaintiff class include "all interstate motor carriers primarily registered outside of the State of Vermont and now or during pendency of this action subject to payment of fees prescribed by 23 V.S.A. 415, 415a and 417."

At the time of filing of the Complaint, Plaintiffs made an immediate application for temporary injunctive relief. The Washington Superior Court denied the Plaintiff's Motion for a Temporary Restraining Order on June 4, 1981, ruling that a methodology existed by statute for payment of refunds of fees paid in under the statutes attacked, and that therefore any harm to the Plaintiffs was not irreparable in nature. It should be noted that the monetary relief requested by the Plaintiffs is a refund to all Plaintiffs, and members of the Plaintiff class, of fees paid in under 23 V.S.A. 415, 415a and 417 for the period during which Act No. 87 was in force, as well as a refund of all penalties paid by Plaintiffs under 23 V.S.A. 421 for a like time period.

---

[1] Given the extensive record in this case, Appellants have not repeated the reproduction of items contained in the Printed Case of the first appeal in this matter (Supreme Court Docket No. 82-021). Items from the Printed Case in that appeal will be referred to as "First Printed Case," and items from the Printed Case in the herein appeal will be designated "Second Printed Case." There also are some additional documents to be filed simultaneously with this Brief, which will be designated "Supplemental Printed Case."

The hearing on the merits was combined with a hearing on Plaintiffs Motion for Preliminary Injunction on August 6 and 7, 1981. Certain facts were submitted to the Trial Court by Stipulation. (First Printed Case, p. 103). It was also agreed by the parties that all evidence introduced at earlier hearings in the matter, *i.e.* June 3, 1981 hearing on Plaintiff's Motion for a Temporary Restraining Order, and July 22, 1981 hearing on Class Certification, would be weighed in the Court's decision on the merits. The purpose of that agreement was to prevent the necessity of reintroducing evidence already in the record. (Transcript, August 6, 1981; pp. 51-52).

After submission of legal memoranda and Requests to Find by the parties, the Washington Superior Court, the Honorable Edwin H. Amidon, Jr., presiding, issued its "Findings of Fact, Conclusions of Law and Judgment Order" dated January 1, 1982 and an amendment to same dated January 7, 1982. (First Printed Case, Pages 243-254, 255). The Trial Court found for the Defendants, upheld the statutes in question, ordered the matter dismissed with prejudice, and ordered that Defendants recover of Plaintiffs their costs of action.

Plaintiffs appealed to the Vermont Supreme Court from the said Order by Notice of Appeal dated January 8, 1982 (First Printed Case, p. 256). In *American Trucking Associations, Inc. v. Conway*, 142 Vt. 17, 451 A.2d 42 (September 7, 1982), the Supreme Court vacated the judgment of the Washington Superior Court, and remanded the case for further factual findings.

The remanded proceeding was specially reassigned to Acting Superior Judge Edwin H. Amidon, Jr. on October 1, 1982. Second Printed Case, p. 1). The parties submitted additional Requests to Find on November 15, 1982 (Second Printed Case, pp. 2-11, 12-36) and on August 5, 1983, the Washington Superior Court issued its "Amended Findings of Fact." (Second Printed Case, pp. 55-60).

Since it was unclear at the time of issuance of the Amended Findings whether they were intended to serve as a confirmation of the Original Judgment Order in the case, or indeed as a new Judgment Order, Plaintiffs filed a notice of Appeal dated August 18, 1983, and simultaneously requested judgment in their favor in the Superior Court by Motion of the same date. (Second Printed Case, pp. 61, 71-72).

On November 16, 1983, Acting Superior Judge Amidon issued a Judgment Order dismissing Plaintiffs' action with prejudice. It was also ordered that Defendants recover of Plaintiffs their costs of action. In order to fully protect their rights of appeal, Plaintiffs filed an additional Notice of Appeal dated November 21, 1983 (Supplemental Printed Case, pp. 1,2). The parties have stipulated that both Notices of Appeal be consolidated in one proceeding, and to assure a speedy consideration of this case by the Supreme Court, have agreed that the relevant date of commencement of the appeal be August 18, 1983, the date of the first Notice of Appeal. This brief is being filed in accordance with that stipulation. (Supplemental Printed Case, p. 3)

Plaintiffs are seeking a reversal of the Washington Superior Court Judgment Order of November 16, 1983, and entry of judgment on the merits in their favor.

* * *

Conclusion

In its Judgment order dated November 16, 1983, the Washington Superior Court upheld the constitutional validity of the statutes in question and therefore refused to grant Plaintiffs the relief requested in their Complaint, stating as follows:

> ". . . it is hereby Ordered and Adjudged that Plaintiffs' action is Dismissed With Prejudice and

that Defendants recover of Plaintiffs' their costs of action."

The precise relief sought by the Plaintiff-Appellants is a declaration that the statutes in question are unconstitutional, the reversal of the above Judgment Order, and the remand of the herein action to the Washington Superior Court for the purposes of granting to Appellants appropriate monetary and other relief as requested in their Complaint.

[Signatures omitted]